

700 Bay Street
24th Floor, Box 330
Toronto, Ontario
M5G 1Z6

IN THE MATTER OF

The Lakes and Rivers Improvement Act.

AND IN THE MATTER OF

An application of Anthony Mete for approval of construction of a culvert crossing on Lots 10 and 11 in Concession IV, in the Former Township of Crowland, City of Welland, in the Regional Municipality of Niagara.

REPORT TO THE MINISTER OF NATURAL RESOURCES

Pursuant to the appointment of your predecessor, the Honourable Vincent G. Kerrio dated the 16th day of February, 1989, the undersigned has held a hearing under the provisions of the Lakes and Rivers Improvement Act as to whether the proposed refusal of the application for approval of the location of the darn is fair, sound and reasonably necessary for the purposes of the Lakes and Rivers Improvement Act. The hearing was held in Allanburg on May 17 and 18. Arrangements were made, presumably with the consent of counsel, for the continuance of the hearing on Friday, May 19, but counsel for the City of Welland was unable to attend. Consequently the hearing was continued in Toronto on June 2, 1989.

At the hearing S.R. Davidson appeared on behalf of the Ministry of Natural Resources. The applicant was represented by J. Pichelli of the firm of Pichelli and Turingia of Burlington, Ontario. At the hearing a number of landowners and a number of municipalities and organizations appeared and without objection a number of additional parties were added. The City of Welland was represented by G.C.M. Banks. The City of Niagara Falls was added as a party and was represented by Gretchen de Boer, a planner with the city. The Regional Municipality of Niagara was made a party and was represented by Catherine Desjardins, an employee of that municipality. Lorne Yade, Robert K. Wishart, Breck Foerstner, Helen Brown, Dominic Calabretta and Candace Paris, landowners, were made parties. Richard Brady appeared on behalf of the Niagara Falls Nature Club and Marion Strebog appeared on behalf of the Federation of Ontario Naturalists. Both representatives read a statement. The statement of the

Federation was filed as Exhibit 1 and the statement of the Nature Club was filed as Exhibit 6. Peter Kormos, the local member of the Legislature, was also awarded party status. Mr. Kormos requested a view and with the agreement of the parties a view was held on the afternoon of Thursday, May 18, 1989.

Prior to the commencement of the hearing it was agreed by the parties that the Ministry would have the carriage of the hearing.

The subject matter of the hearing was a proposed driveway in respect of a house that was nearing completion of construction by the applicant. The driveway crosses a watercourse known as Lyons Creek for the purpose of providing access to Lyons Creek Road on the north side of the applicant's property. At the outset counsel for the applicant admitted that the lands on which the fill had been placed had been classed as a Class 1 wetlands under the provincial classification of wetlands and that no issue existed in respect thereto.

Lyons Creek rises some distance to the west of the subject lands and flows easterly through the City of Welland and the City of Niagara Falls into the Niagara River. Some distance upstream of the subject lands the Welland Canal crossed the creek with the result that the provision of a water supply for the creek became dependent at that point on a siphoning device in the canal. Between the subject lands and the canal there were the usual sources of additional water and no evidence was produced to the tribunal which seriously cast doubt on the calculations in respect of the flows and elevations that were made in connection with the waters of Lyons Creek.

In 1973 the applicant, his wife, his daughter and his son-in-law acquired three parcels including the subject lands. The subject lands contain approximately 44 acres and are bounded on the north by Lyons Creek Road and on the south by Yokum Road. The parcel is bounded on the east and west by privately held lands. There is approximately a frontage of 1,400 feet on Yokum

Road and the depth of the property is approximately 1,600 feet. The frontage on Lyons Creek Road is approximately 1,400 feet. The daughter resides on a property lying on the north side of Lyons Creek Road and the objective in constructing a retirement home on the subject lands and building a driveway to Lyons Creek Road was to enable not only access to Lyons Creek Road but to provide a short direct route for walking between the two properties.

On September 1, 1988 the City of Welland issued a building permit to the applicant and his wife for the construction of a wood frame single family dwelling on the south side of Lyons Creek Road. The building permit indicates a municipal number of "925 Lyons Creek Road". One of the conditions of the building permit read "Building approved at 590'-0" ft. from front property line".

At a similar time the applicant arranged for the extension of water services by the city to provide service to the house. He paid a deposit of \$1,500 for a water service to service his house and the receipt for the water service issued by the City of Welland read "Deposit only on new 2" service to house no. 925 Lyons Creek Road."

At this time the applicant dealt with the local conservation authority and was assured there were no problems in connection with the authority. He was required to provide detailed drawings and expected to receive the permission from the conservation authority to construct a driveway across the valley of Lyons Creek. A meeting was held for the consideration of his application to the conservation authority and at that meeting a number of objections were made by concerned citizens. He was subsequently required to deal with the Ministry of Natural Resources for an approval under the Lakes and Rivers Improvement Act. However prior to making this application he had caused contractors to place a significant quantity of fill in the valley of the Lyons Creek. At some time he acquired two large culverts having a diameter of eight feet, six inches which are now on the property. Prior to action being taken by the Ministry of Natural Resources to stop the dumping of fill, sufficient fill for the

purpose of the project was placed on the site and although there was no precise measurement the fill covered an area of approximately 30,000 square feet being a width of approximately 100 feet and a length of some 300 feet across the valley. Additional fill was placed on the property in respect of the water line but that fill is not the subject matter of the present application.

The applicant has had temporary access to Yokum Road for the purpose of the construction of the house which was built approximately in the centre of the property and several hundred feet to the south of the valley of the creek.

On cross-examination by counsel for the Ministry the applicant admitted that on August 18, 1988 he was aware that the subject lands were designated as wetlands under the programme of the Province of Ontario, that the significance of the wetlands had been explained to him and that the Ministry staff was helpful although they did not indicate at that time approval would not be given. He also admitted that he had been advised by a letter of July 21, that he required approval under the Lakes and Rivers Improvement Act.

Dealing with the evidence of the Ministry, Antoinette Iudigiani, the land technician for the Ministry of Natural Resources at Thorold, gave evidence. She produced topographic maps showing the general location of the subject lands and sketches were prepared illustrating the proposed crossing in relation to existing crossings (Exhibit 10). This exhibit indicated that there are a number of existing public crossings of Lyons Creek but also that there is a potential for additional similar crossings to that proposed by the applicant where land is owned by landowners on each side of the creek. She indicated that there was a potential of eight similar crossings in a seven mile stretch of the creek.

The witness also produced photographic evidence showing the subject lands, the fill that has been placed on the subject lands and the nature of the valley of Lyons Creek. The evidence

shows that there is a channel meandering through the valley in periods of low or normal flow and that there is a luxurious growth of aquatic vegetation on either side of this channel.

The witness received from the Niagara Peninsula Conservation Authority a copy of the application of the applicant dated July 21, 1988 for the twin crossing of the creek. At that time she had sent a letter to the applicant advising of the need for approval under the Lakes and Rivers Improvement Act and on August 10, 1988 she received an application along with a plan of the proposed crossing. Upon receipt of the application she circularized the usual agencies including the Ministry of the Environment, the regional municipality and the city and other internal offices of the Ministry of Natural Resources.

The witness' first personal contact with the applicant was on August 19, 1988 when he attended at the office in connection with his application for a building permit as the municipality had advised him of the concern of the Province in respect of the wetlands forming part of his property. She discussed with the applicant on that occasion the significance of wetlands. She also had the assistant district biologist attend and there was further outlining of the Ministry's concern for the protection of wetlands particularly from the fish and wildlife aspect.

The witness subsequently attended at the property pursuant to the request for permission for approval and noted the fill placed on the property at that time. Photographs were taken showing the extent of the fill. On August 29 the applicant attended the office of the witness and on that occasion was handed a letter advising him to refrain from placing further fill until the matter was resolved. He was warned of potential charges under the Lakes and Rivers Improvement Act and the Fisheries Act and he agreed to cease filling. Shortly after the last-mentioned meeting the witness received complaints of additional filling and visited the property noting that additional filling had been done. This evidence clearly

establishes that prior to the receipt of his building permit from the City of Welland the applicant was fully aware of the concerns of the Ministry of Natural Resources and the *position* of the Ministry of Natural Resources that approval under the Lakes and Rivers Improvement Act was required.

Evidence was also given of public concern expressed to the Minister of Natural Resources through a petition from persons residing in the area and particularly landowners along Lyons Creek who were opposed to the crossing. Evidence of further complaints regarding the continuance of filling were received by the Ministry and on taking the matter up with the applicant the witness was advised that the applicant felt that there was nothing he could do to stop the filling by other persons on his property.

Following a number of discussions with the applicant as to the action that might be taken including the possibility of opening a road allowance, a new application was filed on November 4, 1988. It was circulated to the usual authorities and notice was given to landowners within 400 feet of the property. In response to the notice 29 telephone calls and 17 letters were received objecting to the construction of the proposed crossing with reasons being flooding, preservation of wetlands, interference with the flows of water, creation of debris at the crossings, possibility of erosion and protection of wildlife. A resolution opposing the application was received from the City of Welland. The City of Niagara and the regional municipality opposed the granting of approval based on the preservation of wetlands. The regional engineer's office of the Ministry of Natural Resources recommended refusal based on a concern for upstream flooding. The fish and wildlife officials of the Ministry gave a recommendation for refusal based on the wetlands and fisheries aspect. For these reasons a decision was made to reject approval and steps were taken to institute the hearing after the applicant requested a hearing.

During cross-examination of the witness by counsel for

the applicant, reference was made to the guidelines and the policies and procedures of the Ministry under the Lakes and Rivers Improvement Act. On re-examination the witness confirmed that it was not unusual that in dealing with particular cases the guidelines were not applied by reason of additional or special conditions of the application.

Leslie Andrew Pataky, who was the Acting Regional Engineer at the time the application was made, prepared a report on the hydraulic impacts of the proposal and the risk of flooding and erosion of the proposed dam. His report was filed as Exhibit 22. In summary his report was that in all storms the proposed dam would cause an increase in flooding of one-half to two feet dependent on the location of the land being flooded. The most serious increase would be at Pearson Road, the second public street upstream from the proposed site. This is an older crossing which has not been engineered to modern standards of hydraulics. Further a natural gas pipeline has been affixed to the structure which adds to the risk of flooding of that bridge. The witness confirmed that the standard for assessing applications in the area under the Niagara Peninsula Conservation Authority had recently changed from the Hurricane Hazel standard to the 100 year standard and that with the consideration of the lower standard the implications of overtopping are not applicable.

The witness pointed out that the walls of the valley are well defined and for this reason the horizontal difference in flooding is not significant. He also stated that the vertical depth of the increase in flooding was significant and that this was the area where concern arises. During the view the witness pointed out that the elevation of the regional flood at the site was approximately at the midpoint of the bank and that the risk of flooding of adjacent lands does not exist.

At the hearing the witness went on to outline the risks associated with the deeper flows including increased velocities. He concluded that there was a potential for scouring and erosion

for 60 feet both upstream and downstream of the structure. He pointed out that the sediment would be removed downstream causing sedimentation. It was the opinion of this witness that because of the increase in flood levels, the effect on upstream area levels, the precedential and hydraulic effects, the concerns regarding the Pearson Street Bridge and the gas main attached thereto and the risk of scouring, the application be refused.

The witness' conclusions in respect of flooding are found on p. 8 and read as follows:

As evident from Tables 2, 3, and 4 the proposed crossing would increase the upstream water levels under all frequent floods. The increase in flood levels would extend beyond Lincoln Street (approximately 1.5 miles upstream). The impact on the regulatory flood event (100 year flood) as shown on the maps in Appendix D is considered significant.

As mentioned earlier, the Pearson Road crossing is a low level crossing. The obvert elevation of this crossing is 573 feet and the minimum top of the road elevation is 575 feet. Cross section no. 450 is located at the upstream face of the crossing. Under existing conditions, the 100 year flood level (572.42 ft) would remain below the obvert. With the proposed crossing the flood level (574.23 ft) would rise 1.2 feet above the obvert and the bridge would experience pressure flow. Since there would be no free water surface to allow passage of floating objects, the potential for ice and debris jamming would be increased. This could result partial blockage of the opening, overtopping and damage to the roadway and obstruct safe vehicular passage by the public. Also, there is a gas main which is secured to the upstream face of this crossing. This gas main could potentially be ruptured by the impact of ice or debris.

The analysis with the proposed crossing and a second similar crossing shows that backwater effects are cumulative. This is due to the flat gradient of the watercourse. Overtopping of the Pearson Road bridge crossing would result under the 100 year flood with resultant impacts as outlined above.

The witness also dealt with the increase in velocities resulting from the introduction of the proposed structure into the flood plain. Table 8 of his report indicates that the velocities increase in all cases from approximately two feet per second to velocities in the range of six and seven feet per second. The conclusions of the witness are found on p. 10 and read as follows,

1. The crossing of Lyons Creek as proposed by

Mr. Anthony Mete would increase the upstream flood levels under all frequency floods and would therefore affect upstream riparian owners beyond Lincoln Street (approximately 1.5 miles upstream).

2. Pressure flow would occur at the Pearson Road bridge under the 100 year flood as a result of the proposed crossing. Damage to the gas main fixed to the upstream face of the bridge could result due to the impact of ice or debris.
3. The backwater effect of the crossing as proposed would increase the potential for ice and debris jamming under the 100 year flood at Pearson Road. This could result in partial blockage of the bridge opening, increase upstream flooding, overtopping of the Pearson Road, obstruct safe vehicular passage by the public and damage the roadway and bridge.
4. The proposed crossing would significantly increase channel velocities at the culvert inlet and outlet. This would result in stream bed erosion unless armoured.
5. The backwater effect of similar crossings on Lyons would be cumulative. Two crossings similar to that proposed by the applicant would increase 100 year flood levels to the point that Pearson Road would overtop with resultant impacts as discussed in point 3 above.

The witness was cross-examined by counsel for the respondent in respect of the guidelines issued by the Ministry for dealing with applications under the Lakes and Rivers Improvement Act and on re-examination the witness agreed that the guidelines were merely guidelines and would not necessarily be followed in all cases.

Counsel for the Ministry also called Douglas Arnold Hagan, a biologist with considerable experience in the Ministry and who had worked on the preparation of the classifications of wetlands. Hagan outlined the history of the development of the wetlands program of the Ministry. He pointed out the significance of wetlands emphasizing the usually recognized uses of fish and wildlife habitat but also pointed out other not so well known benefits of wetlands such as purification of water, removal of toxic elements and nutrients and the prevention of erosion and pollution. He also emphasized that there were

certain social aspects of wetlands including bird-watching and nature-watching, which are being considered important, particularly in areas near urban development. On cross-examination he further referred to scientific studies that related to the effect on the ecosystems particularly the study of genetic material which may have relevance in the study of the existence of life itself.

Counsel for the Ministry also called Anne Robina Yagi, the Fisheries Enhancement Officer for the Niagara District of the Ministry of Natural Resources who was responsible for the Ministry's programme of rehabilitation of fish habitat as well as other methods of population maintenance. She produced photographic evidence of the wetlands area, pointing out that Exhibit 28 displayed at least three plant communities, across an area of 50 metres in width. She dealt with the classification of the area in the wetlands classification. Out of a possible total score of 1000, the area received a score of 211 for biological aspects, 149 for social aspects, 109 for hydrological aspects and 120 for special aspects. The area contains habitat for the marsh wren and the black crowned night heron, birds that are provincially rare and any reduction in species tends toward the endangerment of such species. They are also rare in the Niagara area with populations existing only in the Wainfleet Bog, the Dunnville Marsh and one or two other areas.

The witness gave evidence that the security of wetlands is highly impacted by commercial and residential development. Roads and railway crossings impact the areas. She referred to the wetlands as being a riverine wetland and stated that the proposed crossing impounds the water reducing the riverine characteristics or quality. In addition to the creation of ponding there are micro-changes which can be dynamic. Changes occur in the species of fish and the food for fish and there is a risk of a change to the whole ecology.

The witness noted that the construction of a crossing creates a loss of habitat and loss of space for a species of fish

and wildlife. Some species leave the area. The scouring, to the extent of sixty feet in either direction, although sometimes used to enhance the habitat for cold water species has a serious effect in respect of warm waters species. The downstream movement of sediment changes the species of vegetation to an upland species of habitat which is an undesirable change. Also the accumulation of sediment reduces the area of the wetlands and narrows the width of such wetlands by the importation of sediment to areas not previously subject to sedimentation. The witness referred to accumulative loss of habitat with loss occurring both at the site of the removal of the sediment and the site of the location of the sediment. The result is a reduced fishing, hunting or viewing opportunity.

With reference to the ultimate effect the witness was unable to measure whether the proposal would reduce the present category allotted to the wetlands in issue. She was satisfied that there would be a reduction in some of the numbers, particularly a loss of the filtering ability of the wetlands and recommended against a granting of the approval sought. She relied on the matter of precedent and the loss of the specific habitat in question.

When cross-examined by Mr. Bank~, the witness indicated that the channel and the flood plain adjacent thereto were considered to be part of the wetlands, with the exception of parts used for agriculture. She referred to red maples growing on the bank and indicated that this part of the bank would be considered part of the wetlands. Other parts of the banks which did not sustain an aquatic vegetation would not be treated as being part of the wetlands. The determination depended on the species found growing on individual sites. By way of example the witness indicated that if oak trees were found that area would not be included in the wetlands. The witness also noted that the area was already heavily impacted with crossings and expressed concern regarding the precedent-setting aspect of the application, if approved. With reference to the fish populations

the witness indicated that the populations were warm water species including bass, perch, pike, pumpkin seeds, carp and pickerel.

The witness also indicated that the wetlands system is dynamic and not static. It is always changing with species moving in and out of the system. Evidence was given that an area was capable of recovery from pollutants if the water quality can be corrected. However the loss of habitat from the placing of the fill constituted a permanent impact.

Turning to the evidence of the landowners and other groups, the evidence basically expressed concern for the loss of the wetlands and the precedential implications. In particular Candace Paris, a downstream owner, spoke on toxic damage to turtles and other wildlife from factory spills. She also referred to the fact that the stream narrowed downstream of the site and that the property abutted the property of a railway with a crossing. She expressed concern that there would be pooling both above and below the crossing of the applicant. She also gave evidence that she and members of her family have spent time in the past clearing debris that collects above existing dams. She indicated that such accumulation of debris also occurs in the summer. She expressed concern for the precedential aspects of the matter indicating that, in her opinion, the area was one of the prettiest places in Ontario evidencing birds, fish and natural conditions. She referred to the area as being an area with historical values and that the neighbours wished to protect the creek.

Dominic John Calabretta read a written statement that is filed as Exhibit 39. It was submitted that Ducks Unlimited are acquiring wetlands and spending large sums of money to preserve wetlands. It was submitted that it was inconsistent to permit existing wetlands to be destroyed at the time such programmes are in effect. He also submitted that since the placement of the fill he had been able to see the bottom of the creek which he had not seen since 1955. This indicates that there was less water in

the creek at the particular time but he produced no scientific evidence to establish that this factor related to the existence of the fill that is already placed. He also expressed concerns regarding the ability to use Lyons Creek for skating, canoeing and snowmobiling.

Jacqueline Patricia Calabretta read a statement which was filed as Exhibit 40. She endorsed previous submissions and summarized her views in five points as follows:

- a. If Mr. Mete builds his crossing, the public rights to Lyons Creek will be non-existent in that area.
- b. The riparian owners may suffer flooding from restricted flow.
- c. The wildlife and the fish are going to take second place to the crossing and may suffer because of the traffic and the disruption of the flow and habitat.
- d. If the crossing is allowed, the natural state of the waters and the shores and banks will be destroyed.
- e. If the crossing is complete, the location is not suitable (being a hidden intersection, in a gully, and also by preventing drainage from the road in the gully), and there will be no guarantee of safe and efficient maintenance.

The witness submitted that it was a shortsighted policy of permitting interferences with a prime class of wetlands in the interest of an alleged convenience. She also submitted that the creation of a private crossing did not constitute an improvement of a waterway, namely Lyons Creek, within the meaning of improvement in the Act. She submitted that there was no established need for a crossing. The Calabrettas own a property backing onto the creek but they were unsure of their boundaries.

Helen Brown, a landowner in the area, gave further evidence of the accumulation of debris above existing crossings and the lack of attention given by the owners of existing crossings to the accumulation of debris.

Mrs. Brown also alleged that there was a significant inconsistency between a requirement of a building permit to make a small adjustment in a building and the ability to change a

wetlands if such is the legal situation. She referred to the precedential implications and raised the issue of the ownership of the bed of the creek although she had no evidence to deal with this subject.

Robert Knight Wishart, who resides in the area, made a written submission dated May 17, 1989 which was read and which was filed as Exhibit 41. Mr. Wishart addressed the wetlands aspects of the portion of Lyons Creek in issue in much the same fashion as the other witnesses. However he raised another interesting issue which, in the opinion of this tribunal, is not relevant. He referred to the historical and archaeological aspects related to the War of 1812-14 and evidence relating to the death of soldiers who were buried on the south side of Lyons Creek. While the Lake and Rivers Improvement Act with its broad definitions may reach beyond the technical construction of dams in the layman's sense of the term, the Ontario Heritage Act is legislation which deals with the matters raised by Mr. Wishart and this tribunal doubts that such matters fall within the concept of clause 2(d) of the Lakes and Rivers Improvement Act. As the tribunal understands the evidence the site of the cairn erected in memory of the soldiers is situate some 300 to 400 feet from the site in issue.

Lorne Yade emphasized the fish and wildlife habitat and populations. Exhibit 42 contains a number of photographs illustrating various species of flora and fauna that inhabit the wetlands area. Very interesting among the photographs are photographs taken on June 16, 1987 showing the bed of the creek widely inundated as a result of a summer storm. He gave evidence of serious fluctuations in the flows prior to the placing of the fill in issue and questioned whether the opening would accommodate the flow of water that occurs in some heavy rainfalls.

Exhibit 43 is a list of the birds witnessed in the area. Mr. Yade lives in the area and has been there since 1972. He agreed that there was no public access to the creek except at a

location one-quarter of a mile down the road across private property.

Breck Foerstner owns 75 acres across the railroad track downstream from the subject site. He submitted that today's generation should have foresight to reserve and preserve areas such as the area in issue.

Chris Brown, who was not made a party, gave evidence that he has lived in the area approximately one year and he has observed natural things which he had never seen in any area previously and submitted that it would be a shame to restrict the natural aspects of the area.

The City of Welland produced no evidence and filed a resolution as Exhibit 44.

Gretchen de Boer, a planner with the City of Niagara Falls whose duties include the review of applications under the Lakes and Rivers Improvement Act, gave evidence on behalf of the City of Niagara Falls. Exhibit 45 contains the curricula vitae of the witness which indicates a broad experience in resource and planning matters. It also contains a number of statements relative to the general policy of the City of Niagara Falls and the Regional Municipality. The evidence indicates that the City of Niagara Falls has entered into arrangements with the City of Niagara Falls, New York, for the joint establishment of "avenues of co-operation for strengthening efforts to protect and enhance the Niagara River environment." The cities adopted a resolution for a joint municipal environmental policy. A copy of this policy is contained in Exhibit 45 and places a considerable emphasis on the conservation and proper management of water supplies and wildlife populations and their habitat. The position of the City of Niagara Falls with reference to the subject application is contained in a letter of December 5, 1988 to the District Manager. That letter outlines the Regional Policy Plan as follows:

The Regional Policy plan appears to show the Lyons Creek area as an Environmentally Sensitive Area. The Plan objectives for these

areas are:

(a) To preserve, protect and conserve environmentally sensitive areas; and

(b) To permit only those uses which are compatible with and will not damage environmentally sensitive areas.

Policy 7.B.4 is particularly relevant to this application and states:

Uses which could detract from and damage environmentally sensitive areas will not be permitted on or adjacent to these areas.

The conclusion of the municipality reads,

The Regional Policy Plan directs that uses which could detract from and damage an Environmentally Sensitive Area will not be permitted. The proposed crossing appears to be contrary to the Regional Plan as it would damage the immediate wetland area and could possibly damage other areas of the Creek as well. Therefore, this office recommends that the proposed crossing not be allowed.

The witness' evidence indicated that the local municipality had planned for the Lyons Creek floodplain to be retained as a wetlands area within the city and that a recommendation had been made to the Province for the acquisition by the Province of the land by a letter of May 5, 1988.

The City of Niagara Falls owns two downstream properties as well as street crossings. There was no direct evidence that the subject proposal would have any effect by way of flooding on these specific properties.

No evidence was presented on behalf of the Regional Municipality of Niagara Falls.

Turning to the evidence produced by the applicant, Vaino Raun, B.A.Sc., P.Eng., of the engineering firm of R.V. Anderson Associates Limited prepared the plans and specifications of a dam, the plan being part of Exhibit 21 and being attached to the application in this matter. The plan was prepared at a time when the conservation authority used the Hurricane Hazel standard as a regional storm standard and according to the witness plans and specifications were prepared in accordance with Exhibits 31 and 32 which were a report of the General Manager of the Niagara

Peninsula Conservation Authority to his board and a letter from the District Manager to the applicant outlining the results of a meeting held on October 12, 1988. The evidence of the witness was that the plans were prepared in accordance with the requirements of both of these documents and that he, although it was usual to receive inquiries from the conservation authority or the Ministry if there were any difficulties, received no inquiries in respect of his plans.

With reference to Pataky's conclusion regarding erosion i.e. paragraph 4 on p.10 of Exhibit 22, the witness suggested that although he had not made an extensive analysis, the specifications provided for riprap at the outlet of the culverts underlain by filter fabric which would reduce scouring. He indicated further that the proposal was armoured and could be further armoured if required. He added in addition that large rocks could be placed to protect the bed of the river.

With reference to the Pearson Street crossing at which the elevation of the 100 year storm showed an increase in flooding of 1.8 feet, the witness indicated that it was a small concrete bridge which was fairly old and in fairly poor condition. He understood that the municipality considered the bridge to be deficient but has not made any budgetary plans to replace the bridge. He also gave evidence that with an increase in the size of the opening i.e. another culvert, some of the problems of flooding would be reduced.

On cross-examination the witness indicated that he had made no studies of the bridge at Pearson Street and was unable to assess the life expectancy of this bridge. He did agree that there was a greater risk of this structure giving way in a 100 year storm than a new bridge.

Counsel for the applicant also called Anthony D'Amario, B.A.Sc., P.Eng., the Water Resources Engineer of the Niagara Peninsula Conservation Authority who had dealt with the application to the conservation authority by the applicant in this matter. The witness confirmed that, based on the Hurricane

Hazel standard, the conservation authority had prepared a standard of acceptable specifications for the purposes of flooding but he did say in his evidence that he now considers that the matter of preservation of the wetlands is a more serious problem than the control of flooding in respect of the proposed crossing. He indicated that no permission has issued by the conservation authority for the construction of the crossing and that officials of the conservation authority have encouraged the applicant to abandon his project in the light of the implications arising from the fact that the crossing is situated on a Class I wetlands.

Apparently this witness has not reassessed the situation in the light of the 100 year storm but seemed to have no serious objection to the work that was performed by Pataky.

The witness indicated that no fill regulations, at the time of the hearing, had been filed in respect of the subject lands but that such regulations were in the course of preparation. The delay in making the regulation occurred by reason of the absence of the concurrence of the City of Welland in the regulation and such concurrence is now at hand.

The witness filed as Exhibit 36 a copy of a document which contained Ontario Regulation 82/86 as amended. This document was a policy and procedural guide prepared by the conservation authority. Reference was made to certain definitions of the words "channel", "flood" and "floodline". These definitions were contained in the policy aspect of the document and are not contained in the regulation as it appears in the document.

The witness indicated that the conservation authority had assumed jurisdiction under clause 3(c) of the regulation which requires written approval to straighten, change, divert or interfere in any way with the existing channel of a river, stream, creek or watercourse.

Counsel for the applicant also called James D'Arcy Ford, B.Sc., M.Sc., a biologist in private practice specializing in

environmental biology. Ford is associated with a group known as Pollutech Ltd. and is a member of the Life Sciences Group of that organization dealing with matters such as baseline environmental studies for flora, fauna, benthos, plankton, et cetera.

The witness expressed no expertise on matters of flooding. He did give evidence that the proposal had a direct impact on the natural conditions. Firstly there was a physical elimination of the 30,000 square feet on which the crossing is situate. He stated that if there were'or had been any nursery areas or other essential habitat areas, they had been lost as a direct consequence of the fill. However he submitted that the indirect consequences were minimal. With reference to the effect on water levels, water flow and the passage of water for the purposes of fish and wildlife passage, his opinion was that there may have been some effect upstream but there was no substantial difference from what occurs at present and the tribunal assumes when he referred to the present that he meant the time prior to the placing of the fill. He indicated th~t the area of concern would be in the springtime and in areas of extreme run-off and that the problem at such times is the prevention of erosion. He assumed that the engineers could take steps to prevent this erosion and he expressed the opinion that during nine months of the year there are very low flows and the culverts should accommodate these low flows. His evidence was that fish passage would not be prohibited by the structure and that fish could pass through the culverts.

The witness submitted that the species of fish that would inhabit the creek are warm water fish. He indicated that he had looked at the authorities respecting habitat for such fish and found that shallow spawning areas in wetlands are part of the habitat for such fish. He was unable to find any formal record of the species populating the area but he assumed the nature of the species from the habitat.

In reviewing the Pataky report he submitted that the 1.8 feet increase in flood levels during a regional storm would not

have an adverse effect on wildlife.

In dealing with the effects of potential sedimentation downstream the witness had not heard Pataky's evidence but indicated that deposition of soils is detrimental to all wetlands. He assumed that the design of the structure could prevent scouring but if scouring occurred for a distance of sixty feet from the structure the results would be detrimental.

The witness explained his reference to indirect effects by saying that all effects are indirect, both the effects of scouring and the deposition. With siltation twelve inches of water is reduced to lesser depths. When presented with the possibility of nests and other areas of habitat being destroyed in severe conditions the witness' opinion was that such happens regularly in nature and that such occurrences are not an unnatural result.

Mr. Banks raised the issue with the witness as to the effects of the removal of the fill. The witness indicated that he had not considered this issue but his unconsidered opinion was that there is a possibility of adverse effects arising from the actions involved with the removal of the existing fill. With reference to the risks associated with the building up of debris the position of the witness was that such debris would be unlikely to affect the movement of fish. He felt that the engineering aspects would adequately prevent the clogging of the culverts.

Counsel for the applicant made a number of submissions. Several of the submission were legal in nature. It has not been the practice of this inquiry officer to assume the responsibility of the Attorney General to provide the Minister with legal advice or the Divisional Court under the Judicial Review Procedure Act but for the record the legal issues raised are summarized.

1. The Minister has no jurisdiction under the Lakes and Rivers Improvement Act because the body of water, i.e. Lyons Creek, was not a creek with the definition of "river" under that Act.

2. If the Minister has jurisdiction under the

Lakes and Rivers Improvement Act, it is limited to the solum over which the water flows.

3. There is no jurisdiction in the Minister under the Lakes and Rivers Improvement Act in respect of floodplains.

4. The Minister of Natural Resources has no statutory jurisdiction over wetlands.

In respect of the administrative or policy aspects of the matter, counsel for the applicant made four submissions.

1. The hearing being a hearing as to location, as contrasted with the plans and specification of the darn for which there may be no hearing process, and the darn being of a seasonal or periodic nature, an approval is not required under item 2. 2.5 of the published guidelines of the Ministry.

2. The hearing being a hearing as to location, it is the responsibility of the Minister to define the nature and location of the creek in order that a design, i.e. plan and specifications, can be prepared. Included in such information should be evidence of the dimension of the watercourse, its banks, flows of the water and the normal water levels. He submitted that the effect of the engineering report was that there would be a vertical rise in the water levels as a result of the construction of the darn but there was no engineering evidence to suggest there would be a lateral increase, which would be necessary if there were to be flooding. He pointed out that there was no evidence of potential flooding of any land of any landowner along the creek.

3. The report of the engineer dealt with hypothetical situations and failed to identify the nature of and results in normal flows.

4. If a need of a landowner could be established in the evidence, that need should be the governing consideration in determining whether approval should be granted.

5. Consideration should be directed to the issues referred to in section 2 of the Lakes and Rivers Improvement Act

(a) With reference to the issue of public rights, it was submitted that there was no evidence of public rights in the portion of Lyons Creek flowing through the Mete property, that the bed was the property of Mete and that there was no evidence to find that the watercourse was navigable so as to create a public right of navigation. It was suggested that the evidence of canoeing by the public or other riparian owners was not evidence of navigability and that the owner of the land could fence the east and west boundaries of his property and prevent any such use.

(b) There was no evidence of interference

with riparian rights, whatever such may be. Reference was made to the case of Welsh v. Marantette et al. 44 O.R. (2d) 137 and 52 O.R. (2d) 37 but it was submitted that this case dealt with the narrow issue of access to the water and it was submitted that the proposal would not interfere with such access. It was concluded that the case is an example of political interest making a martyr out of a private landowner in the furtherance of the objectives of politicians, individuals and organizations.

With reference to the submission regarding the guidelines, counsel for the Ministry's submitted that they were merely guidelines designed to deal generally and that if more stringent requirements apply to specialized situations the guidelines should not be applied. The present case is a specialized situation by reason of the environmentally sensitive area in issue, particularly the parts where a channel cannot be seen. It was submitted that the Act applied and the structure i.e. the darn, consisted of the culverts and the fill which if constructed would cross the entire area between the vertical banks some distance away from the channel in dry periods. It was submitted that with the making of the application and the attendance at the hearing it was too late for the applicant to deny the application of the Act. Further it was argued that the engineering evidence established that the structure would be a dam within the meaning of the Act and that the evidence of D'Amario, the engineer of the Niagara peninsula Conservation Authority called by the applicant confirmed that the structure would hold back and forward water within the meaning of the definition. As this is a legal issue, as indicated above, no comment will be made thereon.

Counsel for the Ministry argued that the construction of the proposed dam was contrary to the purposes of the Lakes and Rivers Improvement Act (subsection 14(3)) and that the perpetuation of wetlands, a natural resource, and the habitat of fish and other wildlife, fell within clause 2(c) of the Act which lays down the purposes of the Act. It was also submitted that the proposed darn would offend the purposes contained in clauses

(b), the protection of the interest of riparian owners and (d), preservation of the natural amenities of the waters and on the shores and banks thereof. It was submitted that the evidence of enjoyment of the existence of the wetlands by neighbouring landowners established an amenity that was being destroyed. The actual loss of 30,000 square feet of wetlands destroyed by the placing of the fill was argued to be a serious loss of disappearing wetlands. The precedential implications were raised, it being submitted that subsequent applications should be approved based on this case with the ultimate result of the classification of the wetlands being reduced.

With reference to the loss of habitat, it was submitted that the evidence established that there would be loss of fish and other habitat from the filling and from the scouring. Reference was made to the marsh wrens and black crowned night herons that are not found in other parts of the province and the risk of reducing the populations of these species. It was submitted that there was evidence of flooding that would affect upstream lands and that this evidence did not take into account the risks of additional flooding from blockage of the culvert, the evidence establishing that there has been blockage of other crossings such as road crossings in the past.

It was submitted that the past indication of approval of the Niagara Peninsula Conservation Authority should not be accepted as indicating a lack of flooding problems. Three reasons were advanced. Firstly, it was submitted that the position of the conservation authority was not that of the authority itself but of its staff and the committee of the authority had not made its decision. Secondly, it was suggested that the authority staff applied principles related solely to flooding and death attributable to flooding. Thirdly, it was argued that the adopted regional storm for the area had changed from Hurricane Hazel to the 100 year storm and that in the Hazel situation the dam would be overtopped and there would not be the

same restriction of flows as would occur if the dam retained the entire flow. With the reduction of the standard to the 100 year storm, the overtopping would not occur and there would be a measurable holding back of the waters which indicated additional levels of flooding of up to two feet extending upstream one and one half miles with the result that the crossing at Pearson Street would be wholly inundated.

It was submitted that in determining if the proposed refusal were fair, there should be a balancing of interests and that the impact on the Class I wetlands with the loss of fish and wildlife habitat and populations outweighed the inconvenience of the occupants of the new home of the applicant egressing therefrom over the street on the south side of the property.

A final argument was that if Mete wished all the amenities of city living, he should have established his home in a city but having elected to build in a rural area in the vicinity of wetlands, he should accept the controls imposed for the preservation of the wetlands.

Counsel for the City of Welland adopted the arguments of counsel for the Ministry. He endorsed the argument that the watercourse was a creek within the meaning of the Act and pointed to the evidence illustrating channels with flows of water apparent both in the photographic evidence and the view and the creation of a structure that holds back or forwards water. He argued that with respect to the guidelines under the Lakes and Rivers Improvement Act, if erosion was likely to be caused or increased the administrative exemption from the Act was not applicable and consideration of design of construction was not an answer to this concern with the structure.

It was submitted that the consideration to be made in this case is the balancing of the evidence produced by the parties. He suggested the evidence of Raun did not establish that he considered the purpose of the Lakes and Rivers Improvement Act in preparing his design and that the evidence of D'Amario was related to compliance with the Conservation

Authorities Act and was not relevant. He submitted that Ford's evidence supported the position of the Ministry in that he agreed that nothing should occur which would have a negative effect on the wetlands and he did not deny that the proposal had a negative impact on the wetlands. It was submitted that no facts were established to warrant an exercise of discretion in Mete's favour suggesting that the only issue in favour of the applicant was personal inconvenience as contrasted with the loss of 30,000 square feet of wetlands with the accompanying damage to the ecosystem. He suggested that the interest of the city alone outweighed the interest of the applicant. He referred to the warnings of the applicant that approval was not assured and notwithstanding the warnings, the applicant permitted the fill to be placed and proceeded beyond what was proper, not stopping until legal action was taken. It was submitted that the applicant sought equity but had failed to do equity.

In reply counsel for the applicant submitted that subclauses (iii) and (iv) of item 2.2.5.(2) of the guidelines only come into play if the conditions precedent in subclauses (i) and (ii) were met. If they did not apply the other two subclauses are not relevant.

He also submitted with respect to the position of counsel for the Ministry that the right of a property owner not to have his property flooded was not a riparian right but an independent cause of action, independent of riparian ownership and such a right was not included in the list of riparian rights contained on p. 41 of the Welsh case.

With reference to facts, there was no dispute by the applicant against the position that the area to be crossed by the proposed dam was a Class 1 wetlands and an area of natural and scientific interest. The objection was not to the method of determination of these classifications but to the legal effect thereof. Much of the evidence of the landowners and local groups clearly supported the designation by the Provincial officials had

such a point been in issue.

The evidence is clear that there would be a risk of increased erosion at the site. The evidence indicates an increase in velocity from two or three feet per second to approximately six feet per second. In other cases dealt with by this tribunal the evidence has been that a velocity of six feet per second is a serious velocity from the point of view of erosion and the ability of human beings to stand in the waters. There was evidence that indicated that these erosive forces could be dealt with in the specifications. In the approach of this tribunal this aspect is not considered to be significant and the matter is left to be dealt with in the event approval is given at the second stage of approvals. It is apparent however that the areas to be protected as wetlands would undoubtedly lose some of their existing values as wetlands.

The second aspect in respect of flooding was that there clearly was an increase of flooding at the Pearson Street crossing in the 100 year storm situation to the extent of 1.8 feet. The evidence indicated that this would cause the water to rise above the opening in the bridge which would cause increased pressure flow on the bridge and the accumulation of debris with the result that there would be a risk of a washout with the inherent risk of life to persons crossing the bridge at the moment of the washout, and risk of rupture to the gas main. There was no evidence that suggested that these matters could be dealt with in the plans and specifications of the proposed structure. It may be that with an extra culvert or some other device the effect in a 100 year storm could be reduced but there was no evidence produced before the tribunal to establish that such was probable.

With reference to the increased flooding in the 100 year event the evidence, particularly the evidence observed on the view, indicates that there are fairly steep banks and Pataky pointed out to the tribunal that the elevation was only partially up the bank and would, with the darn in place, not rise higher

than the brow of the existing banks of the floodplain.

Counsel for the applicant stressed the issue of need. It cannot be found that there is an absolute need on the part of the applicant to have access to Lyons Creek Road. The applicant's position can only be assessed as a matter of convenience. The inconvenience involves additional travel of approximately one-half of a mile on each occasion that the occupants of the house leave the property. No evidence was produced to assist the tribunal to relate the inconvenience to a monetary basis. The same conclusion may be made in respect of the wetlands value although the evidence of Hagan indicated that studies are being made which do attribute a dollar value to wetlands.

Another aspect on which there appeared to be a conflict in the evidence was the result of the action taken to date by the applicant in placing fill or causing fill to be placed on his land. It was clear that an area of 30,000 square feet of prime wetlands had been destroyed. Ford's evidence was that he had doubts that the harm done by the placing of the fill could be remedied. On the other hand Yagi's evidence was that nature is dynamic and it would follow from this that if the fill were removed nature could accommodate, if not the same, at least alternative wetland habitat. Ford admitted the dynamic attribute of nature and to this extent provided some support for Yagi's evidence. The tribunal can only conclude that approval of the dam should not be recommended on the basis that the harm that has been done is irreparable and the approval might follow on the basis that there had been an ultimate destruction of the wetlands already effected.

Turning to the issue of public use of the lands in question and the alleged interference of the darn to the use of the lands by canoeists, there is nothing in the evidence that enables the tribunal to find that there is a right in the public or a member of the public to canoe upon the part of Lyons Creek in issue. There was no evidence to support a finding that the

watercourse was navigable in law. The tribunal can only assume in the absence of the production of any evidence that the understanding of the applicant that he owned the bed of the creek is sound in law and that there is no right of an individual or the public to go upon that part of Lyons Creek contained within the boundaries of the applicant's property.

However, the foregoing does not preclude there being a public interest in the preservation of the wetlands found in the floodplain of Lyons Creek. The Province through its responsible Ministers has established its policy and has defined the areas to which it wishes the policy to be applied. I leave it to the legal advisors and the judiciary to determine whether those policies can be implemented in this case. This report will be based on the assumption that there is no legislative interference per se with the rights of the owners of wetlands to use them subject to the existing environmental controls found in statutes such as the Planning Act. In this instance we assume that the Ministry was legally correct in applying the principles of the Lakes and Rivers Improvement Act to the situation and that the obligation of the inquiry officer is to have regard to the issues contained in subsection 11(4) of the Lakes and Rivers Improvement Act which reads:

11.-(4) The person holding an inquiry under this section shall hold a hearing as to whether the refusal of approval or the proposed order is fair, sound and reasonably necessary for the achievement of the purposes of this Act.

The subsection refers to the purposes of the Lakes and Rivers Improvement Act which are contained in section 2 of the Act and read as follows:

2. The purpose of this Act is to provide for the use of waters of the lakes and rivers of Ontario and to regulate improvements in them, and to provide for,

- (a) the preservation and equitable exercise of public rights in or over such waters;
- (b) the protection of the interests of

the riparian owners;

- (c) the use, management and perpetuation of the fish, wildlife and other natural resources dependent on such waters;
- (d) the preservation of the natural amenities of such waters and on the shore and banks thereof; and
- (e) ensuring the suitability of the location and nature of improvements in such waters, including their efficient and safe maintenance and operation and, having regard to matters referred to in clauses (a), (b), (c) and (d), their operation in a reasonable manner.

In the view of the tribunal there are no public rights in or over Lyons Creek that warrant the consideration of that purpose. With respect to paragraph (b), this tribunal has pointed out on previous occasions that the wording of the clause refers to "interests of the riparian owners". It has been submitted in the past that this wording is broader than a reference to the "rights of riparian owners" and that matters other than those rights normally classified as riparian rights should be considered. Counsel for the applicant pointed out that riparian rights were listed in the Welsh case. However one of the listed rights is "rights relating to the flow of water". Hence, accordingly the consideration should not be limited to those rights mentioned but may extend beyond to matters that fall within a category that may be termed "interest".

However, if the foregoing conclusion is incorrect in law, there certainly was evidence that there was flooding that would damage the property of the City of Welland in the event of a regional storm and the tribunal can only conclude that the insertion of the dam in such circumstances would constitute an interruption of the flow that could cause actual damage to the property not only of a riparian owner but an owner of part of the bed of the stream of Lyons Creek.

Clause (c) was the subject matter of the greater part of the evidence. There was plenty of evidence to support the concept that on the site there would be an interference with the

perpetuation of the wildlife and other natural resources.

With reference to clause (d) an "amenity" is something that adds to the better enjoyment of life whether it be in the nature of a harbour or a docking facility for a person using a waterway or some other use. The section is not so narrow that it cannot apply to utilization of banks and shores of lakes and rivers by persons other than those navigating those waters. The tribunal is of the opinion that the clause is broad enough to include a consideration of the preservation of wetlands and assuming the Ministry is legally correct there is an area in respect of wetlands that may be considered in this case.

With reference to clause (e) it is more or less an omnibus provision that covers the other clauses but the issue of suitability of location and the nature of improvements are included in the clause.

Accordingly the tribunal finds that there are purposes of the Lakes and Rivers Improvement Act to be achieved in the subject application.

With reference to the argument respecting the guidelines under the Lakes and Rivers Improvement Act it is noted that they are dated 1977. The tribunal adopts the position of counsel for the Ministry that the document contains only guidelines and does not bind the Ministry in any particular case, particularly a case which deals with the newly established concepts of wetlands.

With reference to the submission of counsel for the applicant that it was the responsibility of the Ministry to prepare basic data of an engineering nature for every applicant, the tribunal has no knowledge of any obligation on the part of the Ministry to provide such a service to an applicant. It is the view of the tribunal that such a matter is the responsibility of an applicant.

Turning to the question of whether the proposed refusal of approval is fair, sound and reasonably necessary for the achievement of the purposes of the Lakes and Rivers Improvement Act, it is apparent that there is a conflict between the right to

use one's property as it exists and the public interest in preservation of a publicly recognized wetland area which had been classified as a Class I wetlands and an area of natural and scientific interest. The tribunal is satisfied that there is no unfairness to the applicant in the sense that he was permitted to proceed with his building without knowledge of the requirements of the Ministry or the conservation authority. The evidence as indicated above clearly establishes that he was well aware of these requirements and proceeded with his construction after he was aware of these requirements. With reference to the placing of fill and the purchase of the culverts there was no evidence to indicate the date of purchase of the culverts but the fill was placed on the property by contractors at little or no expense to the applicant. There was no evidence of the saleability of the culverts or the loss on a resale of the culverts and the tribunal cannot make a finding that the applicant has incurred significant expenditures, other than legal expenditures to date. Certainly at the time he became aware of the legal requirements he had not made a significant investment in the fill. He had made an expenditure of \$1,500 for water services but the evidence did not disclose that this expenditure would be lost in the event the dam is not approved. In the opinion of this tribunal it cannot be said that there is unfairness in connection with expenditures on the fill and the culverts prior to the time he was made aware of the requirements of the Ministry.

The only unfairness that could be discussed in relation to the applicant is the prevention of the use of his property in such way as he sees fit. Many private properties contain land or other attributes which have a public significance. Heritage buildings, historical sites, cemeteries and even swamps are today recognized as matters of general public interest or concern. In some cases, compensation in respect of the public interest is provided in the statutory controls, usually through acquisition provisions. In other cases, the broad rights of the landowners are controlled or reduced. The Lakes and Rivers Improvement Act

does not contain any provisions for compensation where refusal of approval of the location of a dam occurs and it can only be concluded that the Legislature intends that private rights should be subjected to the considerations provided in the Act without compensation to the landowner and where the considerations prevail, the rights of the landowner must be regarded in the light of the considerations required by the Act. The tribunal cannot conclude that the application of the principles of the Act constitute an overriding unfairness to the landowner.

With reference to "soundness", the evidence clearly indicates that there is a need for the preservation of wetlands, whether they be owned by the public or are held in private ownership. There was no evidence to suggest that any of the principles put forward by the Ministry were unsound in any way, particularly having regard to the future as well as the present.

with reference to the issue of "reasonably necessary", much evidence was lead and argument submitted in respect of the precedential implications. The evidence clearly indicated that there are other properties which could rely on the present application if approved for similar crossings destroying additional portions of the wetlands in issue. Counsel for the applicant made no submissions to the tribunal which would justify the granting of approval to his client and the refusal of the other landowners in similar circumstances.

The phrase "reasonably necessary" should not be restricted to the issue of precedent. Regard should be had to the implications of the proposal under review and the effect of allowing the proposal on the natural resource under consideration. It is beyond dispute that the exceptional wetlands involved are a natural resource and that the wetlands are dependent on the waters flowing in Lyons Creek. There was no evidence to show that the quality of the wetlands would be preserved or enhanced in any way by the proposal and it can only be concluded on the evidence that the quality will be reduced by the proposal. There was no evidence that the proposal would

reduce the classification of the wetlands but the evidence clearly establishes that the quality of the wetlands as well as the quantity thereof would be reduced.

The key phrase in clause 2(c) is "use, management and perpetuation of the fish, wildlife and other natural resources". While there was no evidence respecting future public use or management of the resources other than the request of the City of Niagara Falls for acquisition of the floodplain, the phrase includes perpetuation of the resources~ Perpetuation is not as strong a control of private lands as the word "preservation" would have created but it does involve a long term concept and a concept of retention of the existing situation. The following definition is found in Gage's Canadian Dictionary:

perpetuate v. -ated, -ating. make perpetual:
cause to last indefinitely: attempts to
perpetuate a species. The Brock Monument was
built to perpetuate the memory of a great man
[<Lperpetuare<perpetuus. See perpetual.]
--perpetuation, n.--perpetuator,n.

The question becomes one of whether there is a reasonable necessity in respect of the position of the Ministry. Such a position is clearly established in respect of the 30,000 square feet of the actual site involved. The reasonably expected results on the remainder of the wetlands are inconsistent with a concept of the status remaining in perpetuity and the tribunal concludes that for both reasons the proposed refusal is reasonably necessary for this purpose of the Act.

Accordingly the tribunal can only conclude that the proposed refusal is reasonably necessary for the achievement of the Act.

For the foregoing reasons, this tribunal recommends that the application of the applicant be refused.

DATED this 25th day of September, 1989.

Original signed by G.H. Ferguson

G.H. Ferguson.